

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**CINDY HUDSON,
APPELLANT**

vs.

**KIMBERLY O'BRIEN, DEBRA CHESHER, AND GAIL VASTERLING,
RESPONDENTS**

DOCKET NUMBER WD77055

DATE: OCTOBER 21, 2014

Appeal from:

The Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

Appellate Judges:

Division Three: Gary D. Witt, P.J., Joseph M. Ellis, J. and Thomas H. Newton, J.

Attorneys:

David J. Moen, for Appellant

Chuck Henson, for Respondents

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

CINDY HUDSON, APPELLANT

v.

**KIMBERLY O'BRIEN, DEBRA CHESHIER, AND GAIL VASTERLING
RESPONDENTS**

WD77056

Cole County, Missouri

Before Division Three Judges: Gary D. Witt, P.J., Joseph M. Ellis, J. and Thomas H. Newton, J.

Appellant Cindy Hudson was employed by the Missouri Department of Health and Senior Services ("the Department") in the Section of Child Care Regulation. As a section administrator, Appellant was responsible for inspections of childcare facilities throughout the State of Missouri. Respondents Kimberly O'Brien and Debra Cheshier served as Appellant's supervisors.

In 2008, Appellant and another Department employee inspected a childcare facility in Jefferson City, Missouri. Following the inspection, Appellant issued a report citing the childcare facility for ten categories of rule violations. Subsequently, the owner of the childcare facility, Karen Werner, contacted the Department to contest several of the violations cited in the inspection report. Appellant instructed another Department employee, Sue Porting, to meet with Werner to discuss Werner's concerns about the inspection report. Following the meeting with Werner, Porting removed several of the rule violations from the report. Appellant did not approve of Porting removing several of the rule violations and reported Porting's removal of the violations to O'Brien.

After receiving subsequent correspondences from Werner, Respondents requested that Appellant draft a written response to Werner's concerns. Respondent Cheshier also instructed Appellant that, "while [the Department is] trying to go through this rule revision process, . . . it is best that we not cite rule violations at [Werner's] facilities that are not obvious safety concerns." Appellant wrote a memorandum responding to Werner's concerns. In the memorandum, Appellant justified the rule violations cited at Werner's facility and responded to Werner's claims of harassment. The memorandum also suggested that the rule violations had been removed from the inspection report in order to prevent Werner's complaints from escalating up the ladder and that the Department had shown such favoritism to Werner in the past.

Shortly thereafter, Appellant was notified of her termination. The Department stated that Appellant was being fired because things just were not working out. After

Appellant's termination, the memorandum written by Appellant in response to Werner's complaints was destroyed.

Following her termination, Appellant filed suit against Respondents alleging that Respondents violated section 105.055, Missouri's whistleblowing statute, by firing her for her disclosures regarding rule violations at Werner's facility. Respondents filed a motion for summary judgment, alleging that Appellant was not entitled to relief under section 105.055 as a matter of law. The trial court subsequently granted summary judgment in favor of Respondents. Appellant now appeals from the trial court's grant of summary judgment.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

Division Three holds:

(1) The trial court erred in granting summary judgment on the basis that, by reporting the alleged wrongdoing to the wrongdoers, Appellant failed to make a disclosure under section 105.055. Section 105.055 does not identify to whom a disclosure must be made. Instead, under the plain language of section 105.055.7, a state employee must show, by clear and convincing evidence, that he or she or a person acting on his or her behalf *has given or was about to give an account* that he or she reasonably believes evidences prohibited activity or a suspected prohibited activity. Accordingly, given the broad language of the statute, Appellant did not fail, as a matter of law, to make a disclosure in that she gave Respondents an account of Porting's removal of the rule violations and Cheshier's directive not to cite rule violations at Werner's facilities.

(2) The trial court erred in granting summary judgment on the basis that complaints made only to supervisors do not constitute whistleblowing as a matter of law under section 105.055.2. Nothing in the statute suggests that the individuals enumerated in section 105.055.1, which proscribes supervisors or appointing authorities from prohibiting employees from discussing agency operations, are also applicable to section 105.055.2, which prohibits supervisors or appointing authorities from taking disciplinary action against state employees for the disclosure of certain types of information. The two sections prohibit a supervisor or appointing authority from disciplining employees for two separate and distinct types of conduct. Accordingly, because the statute's structure does not require disclosures to the individuals enumerated in section 105.055.1, the trial court erred in concluding that disclosures to supervisors do not constitute whistleblowing as a matter of law.

(3) The trial court erred in granting summary judgment on the basis that the information disclosed by Appellant is not protected under section 105.055.2. To be entitled to relief under section 105.055.2, the employee must disclose information he or she reasonably believes evidences: (1) a violation of any law, rule, or regulation; (2) mismanagement; (3) a gross waste of funds; (4) a gross abuse of authority; or (5) a substantial and specific danger to public health or safety. Here, Appellant alleged that she believed the removal of rule violations from the inspection report and the directive to cite only

obvious rule violations put the health and safety of children at risk. Evidence in the record establishes that the Department rules and regulations are intended to protect children in Missouri childcare facilities and that the failure to cite rule violations has the potential to put children's safety at risk. Accordingly, the trial court erred in finding that Appellant failed to prove her disclosures are protected under section 105.055 as a matter of law.

(4) The trial court erred in granting summary judgment on the basis that Appellant was required to exhaust the administrative remedies set forth under section 105.055.5 prior to pursuing this civil whistleblower action under section 105.055.7. The "in addition to" language in section 105.055.7 merely indicates that, besides the remedies set forth in section 105.055.5, a plaintiff may file a civil action alleging a section 105.055 violation. Furthermore, nothing in section 105.055.5 suggests that an employee must seek administrative relief before pursuing a civil action. Thus, the trial court erred in concluding that Respondents were entitled to summary judgment because Appellant failed to seek administrative relief prior to filing this civil action.

(5) The trial court erred in granting summary judgment on the basis that Appellant was limited to a claim of non-economic damages because, under the plain language of section 105.055.7(4), Appellant is entitled to recover actual damages as well as litigation costs and attorney fees.

(6) The trial court did not err in granting summary judgment on the basis that Appellant is not entitled to equitable relief under section 105.055.7. Section 105.055.7(4) does not provide for the recovery of equitable relief; therefore, such a remedy is not available under the statute. Thus, the trial court correctly determined that Appellant is not entitled to equitable relief under the statute.

Opinion by: Joseph M. Ellis, Judge

Date: October 21, 2014

<p>This summary is <i>UNOFFICIAL</i> and should not be quoted or cited.</p>
--